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Prosecution Appeals in West Virginia

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Professional interest in criminal law and procedure has not lagged in West Virginia. The state bar association committee on criminal law has frequently called attention to the inadequacy of much of our present court procedure. The committee has suggested the elimination of technical appeals, an improved bail system, the short form of indictment, greater freedom in the amendment of pleadings, comment on the defendant's failure to testify, and many kindred subjects.[1] Likewise, the prosecuting attorneys of the state have been active in improving criminal law and procedure in its practical administration in the courts.[2] The bench also has lent a sympathetic ear to the demands of simplicity and efficiency where they do not interfere with the valued protection of individual security. Nor is this interest a local one. First on the program of the American Bar Association is the improvement of the administration of justice.[3] The United States Department of Justice also had assumed an active interest in and responsibility for the constructive adaptation of common law criminal procedure to the needs of a new and changed social order.[4] Indeed, it appears that those professionally interested in the criminal law realize that the public is aware that "the administration of criminal law is a disgrace to our civilization" and that they will correct this administration if the bar does not.

In West Virginia, however, there has been little popular demand for a change in criminal law and administration. This is not surprising in the light of the state's strong common law traditions. This common law, at least as the lawyers have seen it, — through the eyes of Blackstone, Minor, and St. George Tucker, — afforded extensive protections to persons accused of crime.[5] In-

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[1] See 43 W. VA. BAR ASSO. REP. 123 (1927); 44 *Id.* 231 (1928); 47 *Id.* 88 (1931); 49 *Id.* 189 (1933).

[2] Correspondence with a majority of the prosecuting attorneys of the state indicates an interest and a desire to simplify and clarify criminal procedure, to the end that the unfairness of present practices to both defendants and the state will be eliminated. With the creation of a judicial council (W. Va. Acts, 2d Extra. Sess. 1934, c. 71) the interest of this group will be given a more effective mode of expression.

[3] Shafroth, *The National Bar Program,* 19 A. B. A. J. 562 (1933); 20 A. B. A. J. 37 (1934).

[4] The Attorney General's Conference on Crime, Washington, Dec. 10-13, 1934.

[5] 4 BL. COMM. 361; 3 BL. COMM. 379; 1 TUCKER COMM. 35 *et seq.* See also 5 Coke 61: "It is a rule of the common law that no one shall be brought twice into jeopardy for one and the same offense. Were it not for this

deed, nearly every procedural adjustment seeking to bring the administration of justice into practical conformity with the exigencies of present day conditions has been considered with reluctance and suspicion if it has necessitated a change from the traditional common law. And this is so, because individual security from unjustified governmental prosecution has been highly valued in West Virginia. Obviously, there should be no thought of relinquishing this protection; but newer devices may give greater effect to the ideal of the common law. Thus, the question in West Virginia is not whether the common law protections should be abandoned but rather how may they be most nearly realized.

We are all too familiar with the dependence upon constitutional rules and statutory regulations of the last century. The most casual reading of the criminal surveys give ample evidence of their ineffectiveness.[6] The change from one rule to another will seldom improve administration; at most it can only afford a greater opportunity for an improved administration. Government, today, must be a government of laws *and a government of men* — for it is man through his creature, law, who determines the character of the social order. Consequently, changing rules, and procedures alone will be unimportant; the need for change usually does not arise from any "inherent" unfairness in the rule but rather from an inability adequately to administer criminal justice under its precepts. Thus when the pace of the social order moves swiftly beyond the concepts of the past, an urgent demand, first felt in public and criminal law, arises. It is then that caution must be exercised for fear that safe-guards proven by centuries of use may not be swept away too quickly and with too little consideration. Conversely, however, with a society unknown to Stephens and Hale, dogmatic retention of useless procedures may injure rather than advance the cause of individual safety. One of the most controversial rules, the rule against second jeopardy, is of this character. It exists today not only without fulfilling its historical purpose but also without serving a modern function. That the rule has frequently been a protection to innocent persons is not a sufficient

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salutary rule, one obnoxious to the government might be harassed and run down by repeated attempts to carry on a prosecution against him. Because of this rule it is that a new trial cannot be granted in a criminal case where the defendant is acquitted. A writ of error will lie for the defendant but not against him. This is a rule of such vital importance to the security of the citizen that it cannot be impaired but by express words."

[6] REPORT OF NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT (1931); CRIMINAL JUSTICE IN CLEVELAND (1922); MISSOURI CRIME SURVEY (1926).

reason for its retention, for innocent men will find other and more useful safeguards; that it frequently protects guilty men is hardly a sufficient condemnation, for guilty men will nearly always find unmerited refuge in quite indispensible procedural rules. It is a sufficient objection, however, that the existence of the double jeopardy rule encumbers trial procedure and permits every criminal trial to be artificially colored to the prejudice of the State irrespective of the merits of the case.

I

Originally second jeopardy meant the second trial of a defendant after one complete trial and verdict according to the then existing procedure of the common law. The common law rule, when transplanted into Anglo-American jurisprudence was emplanted in our constitutional herbarium safe from the reformer's trowel. It was not, however, safe from judicial horticulture. In its new environment the common law rule grew into a rule forbidding further prosecution in the same cause once a jury had been empanelled and a decision on the merits returned. Thus, whatever the common law may have been, the judicial common law in the American states came to forbid the state to appeal an adverse decision in a criminal case.[7] In West Virginia, as in the majority of states, this rule has been strictly followed, and this is so although the constitution confers general appellate jurisdiction upon the Supreme Court of Appeals in all cases "wherein there has been a conviction for felony or misdemeanor in a circuit court".[8]

The right of the state to appeal is specifically reserved by the

[7] See *Ex parte* Bornee, 76 W. Va. 360, 85 S. E. 529 (1915). See also W. VA. CONST., art. III, § 5. "No person shall . . . . be twice put in jeopardy of life or liberty for the same offense." W. VA. REV. CODE (1931) c. 61, art. 11, § 13: "A person acquitted by the jury upon the facts and merits on a former trial may plead such acquittal in bar of a second prosecution for the same offense, notwithstanding any defect in the form or substance of the indictment or accusation on which he was acquitted." *Cf.* W. VA. REV. CODE (1931) c. 61, art. 11, § 13: "A person acquited of an offense, on the ground of a variance between the allegations and the proof of the indictment or other accusation, or upon an exception to the form or substance thereof, may be arraigned again upon a new indictment or other proper accusation, and tried and convicted for the same offense, notwithstanding such former acquittal." W. VA. REV. CODE (1931) c. 51, art. 1, § 3; c. 58, art. 1, § 1 (j). Compare State v. Allen, *infra.* n. 8.

[8] It was expressly decided in State v. Allen, 8 W. Va. 680, 683 (1875), that the use of the word "conviction" was not intended to limit appellate jurisdiction to appeals by defendants but was used only for the purpose of inhibiting the legislature "from legislating away that great right . . . . of appeal after conviction in criminal cases, than which no more sacred right could be guaranteed by the constitution."

constitution "in all cases relating to the public revenue",[9] and general authority to extend additional appellate jurisdiction is also provided.[10] Thus far, however, the legislature has only authorized appeals from a judgment or order sustaining the invalidity or insufficiency of an indictment.[11] With the general appellate power limited to revenue cases,[12] and with only narrow supervisory powers over other criminal cases, appellate review in West Virginia affords little or no protection to the interests of the state in the prosecution and enforcement of criminal justice.

This limitation of review upon behalf of the state is predicated upon the assumption that the constitutional protection against double jeopardy forbids state appeals in criminal cases. If the constitutional protection against double jeopardy is a "fundamental right", then, does not the defendant place himself in second jeopardy by appealing the decision of the trial court. The explanation that he may "waive" his "rights" is hardly satisfactory. If the right is "fundamental" then it must exist to protect the accused even against himself.

The explanation is historical. The doctrine of second jeopardy arose long prior to appellate review of criminal cases.[13] The purpose of the doctrine of jeopardy was not to prevent appeals, for they did not exist, but rather to prevent successive original prosecutions and punishments for the same offense. With the granting of appeals in criminal cases the jeopardy rule was applied erroneously to the consideration of the case upon appeal, with the anomalous result that the defendant did not place himself in second jeopardy if he appealed, but that if the state appealed second jeopardy attached.[14] Thus, the jeopardy rule as applied to prose-

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[9] W. VA. CONST., art. VIII, § 3.

[10] *Supra* n. 7.

[11] W. VA. REV. CODE (1931) c. 58, art. 5, § 30.

[12] Appeals in revenue cases have all involved the enforcement of the liquor license statute and have all affirmed the operation of the statute. State v. Allen, 8 W. Va. 680 (1875); State v. Fitzpatrick, 8 W. Va. 707 (1874); State v. Kyle, 8 W. Va. 711 (1875); State v. Thompson, 26 W. Va. 148 (1885). But the appeal must be from final judgment. State v. Bluefield Drug Co., 41 W. Va. 638, 24 S. E. 649 (1896); State v. Peyton, 58 W. Va. 380, 52 S. E. 393 (1905).

[13] For a most illuminating consideration of this question see, Miller, *Appeals by the State in Criminal Cases* (1927) 36 YALE L. J. 486, reprinted in (1928) ORE. L. REV. 87. See also Hicks, *Moot Appeals by the State in Criminal Cases* (1928) 7 ORE. L. REV. 218; Cooper, *Is the Deciding of Moot Criminal Cases a Judicial Function* (1928) 7 ORE. L. REV. 228; Note (1933) 23 J. CRIM. L. 1039; Note (1919) 26 YALE L. J. 408; (1922) 32 YALE L. J. 93; Note (1921) 23 MICH. L. REV. 584; Note (1919) 4 VA. L. REG. (n. s.) 923, 935; (1933) 81 U. OF PA. L. REV. 340; Note (1933) 10 N. Y. U. L. Q. R. 373.

[14] See Miller, *op. cit. supra* n. 13.

cution appeals became inconsistent and barbarous. But it is one thing to condemn the rule and quite another thing to correct it.

Courts have not uniformly interpreted the jeopardy rule. In most jurisdictions it has been treated as a bar to prosecution appeal.[15] But some courts have said that the rule does not prevent appeals by the state.[16] Thus, Mr. Justice Holmes, dissenting in *Kepner v. United States*,[17] observed:

> "Logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case. . . . . If a statute should give the right to take exceptions to the Government, I believe it would be impossible to maintain that the prisoner would be protected by the Constitution from being tried again. He no more would be put in jeopardy a second time when retried because of a mistake in law in his favor, than he would be when retried for a mistake that did him harm."

Our court in the case of *Ex parte Bornee*,[18] however, follows the majority view and specifically rejected Holmes' interpretation of jeopardy. It insisted that the constitution be interpreted according to "what the makers of our constitution meant by the use of the word 'jeopardy'." The court said that

> "The framers of our constitution naturally had in mind the Virginia law of the subject. But that was not different from the American understanding that a prisoner was once

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[15] See Miller, *op. cit. supra* n. 13, at 487-489.

[16] "The criminal law must move forward to meet the new conditions which confront organized society if its law-abiding members are to be protected in their personal and property rights. Whatever the rule may have been in the past decades, we think now, when there is such wide latitude allowed those convicted of crime to appeal and have their convictions reviewed, there should be a liberalizing of the attitude towards the commonwealth, where the defendant has been convicted and the question ruled against the commonwealth, as here, is purely one of law." Commonwealth v. Simpson, 310 Pa. 380, 165 Atl. 498 (1933).

See also, Commonwealth v. Beiderman, 165 Atl. 765 (Pa. 1933) (plea of *autrefois acquit* was unavailing although juror was erroneously withdrawn). McCreary v. Commonwealth, 29 Pa. St. 323, 325 (1857).

Outstanding, of course, has been the attitude expressed in State v. Lee, 65 Conn. 265, 30 Atl. 1110 (1894).

Also see State v. Felch, 92 Vt. 477, 103 Atl. 24 (1918); *In re* Dexter, 93 Vt. 304, 107 Atl. 134 (1919) and cases cited.

[17] 195 U. S. 100, 24 S. Ct. 797 (1904).

[18] 76 W. Va. 360, 85 S. E. 529 (1915).

> in jeopardy whenever, upon a valid indictment, a jury in a court of competent jurisdiction was regularly empaneled and sworn to try the issue of his guilt. While we derived the principle from the common law of our English ancestors, yet in American jurisprudence at the time of the adoption of our constitution there had grown up a universally recognized, distinctly American doctrine on the subject. The principle had received sanction as a fundamental one to a degree unknown in the English law. And so with us it still stands to-day."[19]

So narrow a theory of constitutional interpretation foists restrictive and outworn procedures upon a changed society. Constitutions are more than the skeletal outline of the political and economic theories of their drafters; they must live and grow with the people, with government, and with society.[20] A constitution must provide a system of government and administration which will protect the dominant demands of society and retain popular respect and confidence. Contemporary experience suggests that there is a general lack of respect for and confidence in the administration of justice in America. And this, at a time when confidence in and dependence upon government, both federal and state, is at a maximum. This disparity is some indication of the need for a critical examination of the present conditions in criminal law administration.

In discussing the merits of the jeopardy rule, the guilt or innocence of a particular defendant cannot be assumed, — the issue is not the result in a particular case but rather the selection of a procedure which will insure a trial system fair to both the prosecution and the defense. To assume that the abolition of the rule would permit the innocent to be twice tried, assumes first the innocence of the defendant, and secondly, that an appeal is a second trial. The real problem is not the mechanistic perfection of terms but rather the perfection of a procedure which will permit a fair and an efficient administration of justice. The present system

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[19] *Ibid.*, at 364.

[20] "It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confirmed to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning: 'We must never forget it is a constitution we are expounding'." Mr. Chief Justice Hughes, speaking for the court in Home Building & Loan Ass'n v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231, 242 (1934).

has failed to provide a system which fulfills the demands of common law protections or the standards of efficiency made necessary by the increased needs for effective criminal law administration.

In practice, today, the defendant in criminal proceedings is almost without restriction in what he may say or do[21] and at the same time the prosecutor is held to a strict compliance with the rules of practice and procedure and to constitutional limitations. This is entirely the result of the one-sided system of appeals which prevents the state from reviewing the activities of the defense or the rulings in its favor. Thus, in most states, the orderly administration of criminal procedure is largely dependent upon the acquiescence of the defense counsel. The prosecuting attorney can do but little to protect the interests of the state. "He knows that a record is being made of his words and actions upon which he may later be taken to task but that he may make no record of the words or actions of the attorney for the defense which will serve for any purpose."[22] Without the protection of appeal the prosecutor must be cautious in word and action. Consequently, the public frequently believes him to be dull; while the defense counsel, unrestricted in his method of attack, is credited with undeserved cleverness.

The right of the state to appeal would impose upon the defense counsel the same responsibility for his words and actions as he demands of the prosecutor. Thus, the equality of position resulting from granting state appeals would do much to improve the quality of practice before the criminal courts of the state. The experience in other states tends to indicate an improvement in the character of counsel and an increase of efficiency in the disposition of cases. Prosecuting attorneys in West Virginia are almost unanimously of the opinion that as a result of the right of the state to appeal in criminal cases there would be an improvement in the quality of procedure and practice on the part of the counsel and the court.[23]

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[21] The defendant is so fully protected that his attorney may conduct himself in a manner that places him in contempt of court and yet if the court errs as a result of such conduct the defendant is permitted to take advantage of it.

[22] Miller, *op. cit. supra* n. 13, at 509.

[23] In response to questions addressed to the several prosecuting attorneys of the state, the replies to the general question "Do you believe that the granting of the right of appeal to the state in criminal cases would improve the quality of criminal procedure and practice in this state?" were overwhelmingly favorable. Asked whether the state appeal would "restrain unfair tactics of defense counsil" all but one prosecutor replied affirmatively. Three thought the state appeal would have no effect.

It is frequently objected, however, that prosecuting attorneys engage as frequently in unfair speech and conduct as do defense counsel,[24] and that the grant of the prosecution appeal would increase these practices. Such statements are largely argumentive, for the relative amount of misconduct between defense and prosecution counsel is, of course, unknown and probably undiscoverable. The errors of the prosecuting attorney are only more evident for his record is always subject to appellate review. The transgressions of the defense counsel appear only interstitially.[25] Indeed the error for which the prosecuting attorney is reprimanded may have resulted from the deliberate and intentional activity of the defense counsel. Likewise, the state is helpless if the prosecuting attorney intentionally commits error in order to insure the accused an acquittal or a reversal upon appeal.

If the error that leads to an acquittal is made by the judge the prosecuting attorney is powerless to protect the interests of the state. If the judge indulges in prejudicial comment or grants an erroneous instruction the accused will usually be granted a new trial by the appellate court; but if the judge's error favors the accused the prosecuting attorney can make no record that will avail him for he cannot appeal.[26] Indeed, prosecuting attorneys

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[24] As to the activities of the prosecutor see State v. Hayes, 109 W. Va. 296, syl. 2, 153 S. E. 496 (1930). "Where remarks of counsel have been excepted to, and the court has thereupon told the jury not to consider opinions of counsel, but pass on the case upon the evidence, the appellate court will not reverse, unless it clearly appears that the accused was prejudiced by the remarks."

But see State v. Morris, 96 W. Va. 291, syl. 3, 122 S. E. 914 (1924). "The persistent effort to introduce improper and prejudicial evidence, in spite of the rulings by the court of its illegality, can only be for the purpose of prejudicing the jury, and is not wholly cured by instructions to disregard it."

Apparently if counsel desists and the defendant does not object there is no error. State v. Alie, 82 W. Va. 601, 96 S. E. 1011 (1918).

But, some latitude must be allowed counsel in discussing the case; the defendant must promptly object and the jury must be instructed to disregard, but there should be no reversal unless the words reasonably appear prejudicial. State v. Cooper, 74 W. Va. 472, 82 S. E. 358 (1914), citing earlier West Virginia cases; State v. Scurlock, 99 W. Va. 629, 130 S. E. 263 (1925); State v. Wolfe, 99 W. Va. 694, 129 S. E. 748 (1925).

[25] "The statement of the prosecuting attorney was provoked by that of the attorney for the prisoner, and a reply to it." State v. Allen, 45 W. Va. 65, 73-74, 30 S. E. 209 (1898).

[26] "The law announced by the trial court, however erroneous and outrageous . . . . constituted the law of the case, for it was the last word of the last court under such circumstances . . . . Regardless of the bitterness of the dose, the State had to take it." State v. Whitmore, 185 N. E. 547, 549 (Ohio St. 1933).

"During the admission of testimony, the court made ironical comments thereon, unfavorable to the accused, in the presence of the jury. . . . . This was error." State v. Hively, 103 W. Va. 237, 239, 136 S. E. 862 (1927).

seldom make objections to rulings on evidence or instructions for they find there is little value in making them, except perhaps as it will help them before the jury — and all too frequently juries misunderstand this activity.

Criminal procedure under the present system had developed from the viewpoint of the defendant. In fact, even the substantive law of crime has felt the effect of the one-sided appellate system. The inability of the state to appeal from erroneous instructions, from adverse rulings or to correct unethical practices of defense counsel has hindered improvement in the administration of justice. Thus, in many states one rule of law is applied in one court and a different practice develops in another. In fact at times laws are at once, constitutional and unconstitutional within the same state.

The consideration of the problem of appeal cannot be completed without a consideration of the cost of criminal law administration. Economy in government lends weight to the value of the state appeal. In the administration of the criminal law many criminals are never apprehended. Of those arrested only a small per cent are actually brought to trial. For example, in representative West Virginia counties over seventy-five per cent of the criminal cases are disposed of without a jury, — the prosecuting attorneys obtaining a plea of guilty in about half the cases and entering a *nolle prosequi* in the remainder.[27] In other words, justice in West Virginia, as elsewhere,[28] is in fact administered by the prosecuting attorney; he either secures a plea of guilt or dismisses the case. The relatively small percentage of cases that actually go to the jury go there because the prosecuting attorney thinks that he can procure a conviction. Thus, "the farther the proceeding goes in each particular case, the greater the probability of guilt and the greater the capital outlay of investment which the state puts into making the prosecution effective."[29] It is only reasonable then that the state should be permitted to safeguard its investment and protect the administration of justice from irreg-

[27] These figures are taken from the author's unpublished survey of criminal justice in West Virginia (1932) in cooperation with The Johns Hopkins Institute of Law, Johns Hopkins University.

[28] Eighty-seven per cent of the cases terminated in federal district courts during the past 20 years have been disposed of prior to trial. In 1933 non-jury terminations constituted ninety-two per cent of all dispositions. See also the special reports of The Johns Hopkins Institute of Law, Johns Hopkins University.

[29] See Miller, *op. cit. supra* n. 13, at 503.

ularities which make long and expensive trials valueless. The state appeal would in large part afford this protection.

Numerous objections have been urged against these considerations of efficiency and economy in the administration of justice. Defense counsel argue that every man is entitled to the judgment of his peers and that appellate review by the state would deprive the accused of this "right".[30] It also has been said that juries exercise extra-legal control over the enforcement of unwise or unpopular laws and that their acquittals are but the expression of community opinion. There is merit in this form of local option if it is admitted that the law should not apply where the people do not wish it to apply and that the jury is the proper forum for its expression. But, if the common law is our guide its purpose and origin argue against this very result. The chief argument centering around the verdict of the jury is that appellate courts might reverse verdicts of acquittal because a verdict was contrary to the evidence. So long as the state, to secure a conviction, must prove guilt "beyond a reasonable doubt" this objection is largely argumentative. Reversals by appellate courts on the ground that the jury's verdict was contrary to the evidence, would be difficult, inasmuch as the state would still be required to establish its case as required by the common law.

The hardship and the expense of trial, and more particularly of appellate review, have frequently been made the bases of attack upon the right of the state to appeal. The validity of this objection, however, is predicated upon the assumption that the defendant is innocent. It is submitted that that is the question in issue. If the accused is proven guilty then he should not be heard to complain, for whatever loss he has suffered must either be figured as a part of the penalty imposed for the commission of the crime or else it is an expense or hardship which he voluntarily assumed by not entering a plea of guilty. If he is innocent then he may indeed have cause to complain. But this is also true under our present system. The increased burden of appeal may be obviated in part by granting preferred position on the calendar to criminal appeals. The unfairness of expense is not alone the ill of prosecution appeal, it exists as an inherent burden of all legal activity. In civil actions many individuals are subjected to long and expensive trials at the demand of private persons, and the law gives only partial relief. Certainly where the state is the interested party

[30] Kepner v. United States, *supra* n. 17.

the defendant should have no greater rights than when a private person commences the action. If the objection is serious, no legal objection stands in the way of permitting the state to assume the cost of the appeal. For the most part objections of this character are not too seriously advanced. It is as one prosecuting attorney in this state has said, "Most defendants feel that you are imposing upon them to bring them to trial at all."

Likewise, the suggestion that the reputation of the defendant will suffere, is without merit, for if the defendant is in fact guilty, the loss of reputation must certainly be accepted as one of the costs of the crime; while if he is innocent, no more satisfactory exposition of it can be obtained than from the opinion of the court of highest appeal.

A few prosecuting attorneys have suggested in their memoranda on this question that the additional burden on an already over-worked court would be undesirable. This is perhaps a valid argument for the limitation of all appeals but hardly a valid justification of limitation of appeal to one group of litigants. Should all civil appeals be limited to defendants? Unquestionably it would reduce the number of appeals; but it hardly seems that the policy by which the result would be accomplished would be particularly desirable. And at all events the threat of an increased burden on appellate courts is probably greater than the actual burden would be. The experience of other states indicates that the number of state appeals is not large.[31] The effectiveness of the state appeal lies not in the fact that the state may or will take a large number of appeals but rather in the restraint that it will impose upon the trial of the case. The essential usefulness of the state appeal is to insure orderly trial procedure. Its real value lies in its preventative character — if it is successful in this, it seldom will be necessary to exercise its curative function.

II

There are four ways in which West Virginia can free itself of the barbarities of the jeopardy rule: (1) the decision in *Ex parte Bornee* can be reversed, (2) legislation adapting Holmes' suggestion in the Kemper case can prepare the way for a new judicial interpretation of the constitutional provision, (3) a legislative system of "moot appeals" can be established, or (4) a constitutional amendment redefining jeopardy can be adopted.

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[31] Miller, *op. cit. supra* n. 13.

The reversal of the decision in the *Bornee* case, of course, would be the simplest method of providing adequate procedure for criminal prosecutions; but in light of the court's decision in the original case, this method of alteration probably would be the most difficult. And yet, it seems difficult to assume that American jurisprudence could have changed the original English procedure, but, when a new social order demanded, was powerless to inaugurate a procedure to provide a newer and greater freedom. Constitutions exist to insure results more than to detail minute procedures. A larger view of the jeopardy rule would give a better protection to individual security and would free criminal procedure from the shackles of an outworn system. However, in the light of settled constitutional experience in West Virginia, it is doubtful that any relief can be expected without a more ritualistic change.[32]

If any change can be effected through judicial agencies, every legislative assistance should be offered. Holmes has suggested that if a statute specifically gave the government the right to false exceptions[33] and, it might be added, specifically defined jeopardy to include appellate procedure, there would be no constitutional basis on which to object. Opinion was equally divided among the prosecuting attorneys who answered the author's inquiry concerning the desirability of this method for changing the jeopardy rule.[34] Statutory changes seem far more possible than the more certain, but more difficult method of constitutional amendment. After the *Bornee* case, the perils of unfavorable judicial decision, of course, are great; but it must be remembered that the *Bornee* decision involved a liquor violation and concerned the interpretation of a statute which did not have as its primary motive the improvement of the judicial process. If general legislation was enacted which would insure adequate safeguards for individual security and at the same time provide a fair and more effective trial pro-

[32] See n. 19, *supra*. But note that the Vermont Supreme Court in State v. Felch, *supra* n. 16, said, "We now hold that relief from the vexation of a second trial is not one (a right guaranteed by due process) and that the constitutional provisions under discussion are not infringed by the statute in question. The view is indirectly approved in *Ex parte* Bornee, *supra*, wherein attention is called to the fact that the Constitution of Virginia (which in this respect is like our own) *does not prevent the passage of an act granting the state the right of appeal in criminal cases.*" (Italics ours).

[33] See n. 17, *supra*.

[34] Although the opinion on the validity of a legislative "re-definition" of jeopardy was quite equally divided, definite opinion was expressed by some prosecutors concerning such an attempt. For example, one said, "I think that any attempt on the part of the Legislature to define 'jeopardy' would be unconstitutional since the word 'jeopardy' had a well-defined judicial meaning at the time the constitutional provision was adopted. . . . ."

cedure, the *Bornee* decision might be limited to the particular class of offenders, because compared with other offenders it raised an unusual presumption against them, and yet might be, as clearly, valid when established as a rule of general procedure.

A third method, the "moot appeal", was almost unanimously rejected by the prosecuting attorneys as an undesirable compromise between the present rule and an improved system of criminal procedure.[35] The moot appeal merely gives to the state the right of appealing any *nisi prius* decision for the purpose of establishing a decision for future precedent, the decision on appeal not affecting the case appealed or the security of the defendant in the case. Thus, the incentive to the defense to take unfair advantages and indulge in unfair tactics would not be weakened. It is an empty victory if the state gains a reversal of an instruction after an appeal to the court of last resort; it is a victory which does not insure protection from the same practice in future trials. There is little reason for the prosecutor to appeal under such circumstances, and less reason for the defense to defend. Thus, the criticism that has been directed against the advisory opinion and other forms of non-controversial and *ex parte* settlements applies with equal strength to the moot appeal.

In spite of these objections several states have adopted moot appeals statutes and find them useful in their criminal procedure. The Iowa statute is typical of the least desirable form.[36] No provision is made for defense representation and consequently it is infrequent that a full consideration of the problem is provided the appellate court. A criminal procedure that is hampered by a defense-dominated trial cannot be remedied by a prosecution-controlled appeal.

Ohio, to avoid this difficulty, provided at an early date that when the state appealed a criminal case, a copy of the bill of exceptions should be served upon the trial court.[37] The trial judge was then authorized to appoint a "competent attorney to argue

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[35] Ten prosecutors favored a moot appeals plan, but suggested that its adoption was desirable only in case a real state appeals system was impossible.

[36] See IOWA CODE (1927) § 14012. "If the state appeals, the supreme court cannot reverse or modify the judgment so as to increase the punishment, but may affirm it, and shall point any error in the proceedings or in the measure of punishment, and its decision shall be obligatory as law." See also N. D. COMP. LAWS (1913) § 11021.

[37] OHIO GENERAL CODE (Page, 1926) §§ 13681-13684; NEB. COMP. STAT. (1922) §§ 10192-10194. See State v. DeWolfe, 67 Neb. 321, 93 N. W. 746 (1903); State v. Cornwell, 14 Wyo. 533, 85 Pac. 977 (1906); City of Sheridan v. Caddle, 24 Wyo. 302, 157 Pac. 892 (1916). 19 L. R. A. 342,

the case against the prosecuting attorney" for a fee not to exceed one hundred dollars. By this plan, Ohio attempts to hypothecate the safeguards of litigous reality. The human element predominates in the law; so long as the defendant is secure in the result of the *nisi prius* proceedings he will give little aid to the criticism of those proceedings by appellate courts. Only when the defendant will suffer for misconduct during trial will the temptation cease. If the goal is an improved trial procedure, rather than "corrected decisions" in individual cases, then the moot appeal is unsatisfactory.

Probably, a constitutional amendment would be the most satisfactory method of changing the jeopardy rule. Certain disadvantages, of course, exist. Solidifying any rule, no matter how salutary, in the relative rigidity of constitutional provision entails the danger of perpetuating a system ill adapted to a changing society. Likewise, the use of the amendatory process reduces the ability to modify the constitution by more flexible means. Locally, the greatest objection to using the constitutional amendment is the likelihood that a technical amendment of this character could not be adopted except in the process of a general constitutional revision. It would be difficult to arouse sentiment sufficiently to promote a separate and individual amendment, and a constitutional revision appears extremely improbable.

Among the prosecuting attorneys, however, there is an almost universal belief in the desirability of this change.[38] A majority of the attorneys expressed their opinion that granting the state the right of appeal in criminal cases would improve the quality of criminal procedure and strengthen the character of practice in the courts of criminal jurisdiction in the state. Likewise, they thought that a more uniform practice in ruling on evidence and motions, and in instructing juries would be developed. There was but a single dissenting vote to the proposition that the state's appeal would restrain unfair defense tactics. On the much debated question of the infringement of the "rights" of the accused there was also agreement, — only two prosecutors believing that equality of appeal would be harmful. Indeed, much of the compassion for

[38] For example, one prosecutor writes, "I still believe in protecting the accused as much as possible." Another says, "If there is any doubt as to the correctness of an instruction, that doubt is resolved against the State and in favor of the accused and I believe this is in accord with the theory of our law that it is better to occasionally allow a guilty man to escape rather than to run any risk of unjustly convicting an innocent person."

accused persons is but the remnant of a now false sympathy occasioned by medieval persecutions of the British Crown.

It may be objected that the prosecuting attorney is a partisan and thus his conclusions should be discounted. Nothing in the replies of these men indicated such an attitude; rather, their letters indicated a full and serious appreciation of their responsibilities as officers of the court in the administration of criminal justice. Nor to them is the state's appeal an unmixed blessing, for with its advantages, it also brings the added burdens of an increased appellate practice. Thus, if reliance can be placed upon the experience and fairness of these prosecutors, it appears that in addition to the theoretical benefits that favor the equality of appeal there are the practical advantages of a more efficient, a fairer, trial, which would build toward a more adequate and effective law enforcement.

Careful organization and thorough understanding is necessary to the improvement of the administration of justice. Cooperation on this problem of jeopardy may furnish a beinning for a complete program for the adoption of the Code of Criminal Procedure.[39] The unified action of the Judicial Council, the State Bar Association, the prosecuting attorneys, and the College of Law would greatly assist the orderly administration of criminal law so as to provide real justice in a changing society.[40]

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[39] See CODE OF CRIMINAL PROCEDURE (Am. Law Inst. 1930).

[40] Reflective of the attitude of many, one prosecutor wrote, "I hope the College of Law will take a lead in these matters so that our State will lead in the reform of criminal procedure." From the combined interests of these many groups, perhaps, an Institute of West Virginia Criminal Law and Administration can be established. The problems for study are many. From valuable letters written by prosecuting attorneys, topics for study were suggested, — an inferior criminal court system, comment on defendant's failure to testify, equality in "striking" the jury, amendment of indictments, the reasonable doubt rule, the filing of an alibi prior to trial, *etc.* Within the confines of the jeopardy rule many problems exist: Should the jeopardy rule be applied differently in misdemeanor and felony cases? Should state's appeal be limited to "questions of law", the introduction of evidence, ruling on instructions, *etc?* Should the state's appeal and the defendant's appeal be equal? If so, to what extent should both be limited? Useful answers to these questions can only be built from the practical experience of lawyers and judges cooperating in the construction of a plan for an orderly administration of justice.